

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

PABLO DEL MUNDO,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

) Case No. DISM-98-0015

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and NATHAN S. FORD Jr., Member. The hearing was held at the University of Washington, South Campus Center, Room 250, Seattle, Washington, on August 17, 1999. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Pablo Del Mundo was present and was represented by Anita L. Hunter, Attorney at Law, of Parr & Younglove, P.L.L.C. Respondent University of Washington was represented by Jeffrey W. Davis, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for gross misconduct and mistreatment and abuse of a fellow coworker. Respondent alleges that Appellant sexually assaulted a coworker.

1.4 **Citations Discussed.** WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Johnson v. Lower Columbia College, PAB No. D93-077 (1994).

II. FINDINGS OF FACT

2.1 Appellant Pablo Del Mundo was a Custodian and permanent employee for Respondent University of Washington (UW) at Harborview Medical Center (HMC). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 30, 1998.

2.2 By letter dated March 4, 1998, Tomi S. Hadfield, Chief Operating Officer at Harborview Medical Center, informed Appellant of his dismissal, effective March 9, 1998, for the reasons of gross misconduct and mistreatment and abuse of a fellow coworker. The incident for which Appellant was dismissed was outlined in a memorandum dated March 4, 1998 from Willie Mieldon, Director of Environmental Services, to Mr. Hadfield. In the memorandum, Mr. Mieldon recommended Appellant's dismissal following an investigation into an allegation that Appellant sexually assaulted a female custodial staff member, Miaou Shou, on November 16, 1997.

2.3 Appellant began his employment as a Custodian at HMC on December 2, 1985. Appellant has received no previous formal or informal disciplinary action.

2.4 In November 1998, Appellant was responsible for cleaning and maintaining patient rooms on the ninth floor of the hospital. The ninth floor of the hospital consists of three modules: A, B and C. Appellant was responsible for cleaning module B. Custodian Miaou Shou was responsible for cleaning module A of the ninth floor. Module C was closed and no patients or medical staff

1 were in the area. With the exception of a break room (room 35) located in module C, which was
2 used by both Ms. Shou and Appellant for break and lunch periods, module C was closed.

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4 2.5 On November 16, 1997, both Ms. Shou and Appellant were working on the ninth floor. The
5 events which occurred between 2 p.m. and 2:30 p.m. are in dispute, however, based on the credible
6 evidence and testimony presented, the Board finds that the following occurred.

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8 2.6 On November 16, 1998, between 2 p.m. and 2:30 p.m., Ms. Shou entered the break room in
9 module C. Appellant was already in the break room, sitting on a chair with his eyes closed. Ms.
10 Shou believed that Appellant was asleep. Ms. Shou sat down to complete her time sheet for the
11 day. Shortly thereafter, Appellant stood up, approached Ms. Shou and stated, "I love you. I love
12 you!" as he put his arms around her and squeezed her. Ms. Shou remained seated on the chair while
13 Appellant stood facing her. Ms. Shou became scared and responded, "Are you crazy?" As her
14 voice started to get louder, Appellant used his hand to cover her mouth. Ms. Shou was unable to
15 scream or remove herself from the chair. Ms. Shou was trapped in the chair with Appellant in front
16 of her and walls behind her and to her right. Appellant was touching Ms. Shou's body, including
17 her breasts. Appellant pulled down his pants and then unsuccessfully attempted to remove Ms.
18 Shou's pants. Ms. Shou was attempting to push back on Appellant but was unable to free herself.
19 During the struggle, Ms. Shou touched Appellant's genitals, which caused him to ejaculate on her
20 leg. Immediately afterwards, Appellant released Ms. Shou, stated that she had scratched his hand
21 and left the lunch room.

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23 2.7 Ms. Shou was extremely frightened and was shaking uncontrollably as result of the incident.
24 She gathered her papers and went to room 45 (the ninth floor housekeeping room) where she sat
25 down, still upset and shaking uncontrollably. She then attempted to finish cleaning her assigned
26 area but was too upset to do so. Instead, Ms. Shou returned to room 45 and waited until her shift

1 ended. Ms. Shou was wearing a uniform provided by the hospital, which she removed and placed
2 in a dirty laundry basket. Ms. Shou changed into her own clothes and proceeded to the staff office
3 to punch out for the day. Still upset, Ms Shou wanted to tell her supervisor, but numerous other
4 employees were in the area and she felt too embarrassed, upset and uncomfortable to discuss the
5 incident.

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7 2.8 Ms. Shou reported to work the next morning and punched in for the day at approximately 7
8 a.m. Ms. Shou wanted to tell her supervisor about the sexual assault but again noted that numerous
9 other staff were present and instead decided to wait. Ms. Shou reported to her assigned work area
10 on the ninth floor, but she still felt shaky and afraid because of the incident. Unable to work, Ms.
11 Shou waited until 7:30 a.m. and then proceeded to her supervisor's office. After telling her
12 supervisor, James Walker, what had occurred, Mr. Walker assigned Ms. Shou to work on the fourth
13 floor.

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15 2.9 Willie Mieldon, Director of Environmental Services, investigated Ms. Shou's allegations
16 against Appellant. Mr. Mieldon observed that Ms. Shou was visibly shaken when she talked about
17 the incident and that she was consistent in her description of the incident. Mr. Mieldon also
18 interviewed Appellant. Mr. Mieldon credibly testified that when initially questioned, Appellant
19 denied that anything had occurred with Ms. Shou. Rather, said he had been in the break room but
20 left shortly after Ms. Shou entered. Mr. Mieldon concluded that Appellant was not credible
21 following a subsequent conversation they had in which Appellant stated to Mr. Mieldon that he had
22 not been in the break room but had been cleaning rooms when the alleged incident was supposed to
23 have occurred. Mr. Mieldon concluded that Appellant was not telling the truth, and after
24 completion of the investigation, Mr. Mieldon recommended that Appellant be terminated.

25 26 **III. ARGUMENTS OF THE PARTIES**

1 3.1 Respondent argues that Ms. Shou is a credible witness who had no motive for lying.
2 Respondent asserts that Appellant, on the contrary, has changed his story and is not a credible
3 witness. Respondent argues that Ms. Shou's assertions that the incident occurred are supported by
4 her demeanor when she described the incident because she was visibly upset and shaken and by her
5 consistent retelling of the story. Respondent argues that termination is the appropriate sanction.

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7 3.2 Appellant denies the events described by Ms. Shou occurred and states that he did not take
8 his break in the ninth floor lunch room on November 16, 1998. Appellant asserts that he took his
9 afternoon break in the men's locker and spent the time filling out his time sheet. Appellant also
10 contends that he was cleaning patient rooms during the time period in question. Appellant states
11 that Ms. Shou's statements have been inconsistent, that she is not credible, and that he has
12 consistently denied the incident took place. Appellant also argues that the events as described could
13 not have physically happened. Appellant questions why Ms. Shou waited to report the incident and
14 why the police were not notified of the assault. Appellant argues that Respondent has failed to
15 prove that the incident occurred and asks that he be reinstated to his position as a Custodian.

16 17 **IV. CONCLUSIONS OF LAW**

18 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
19 herein.

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21 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
22 the charges upon which the action was initiated by proving by a preponderance of the credible
23 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
24 sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-
25 240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

1 4.3 Abuse of fellow employees is established when it is shown that the employee wrongfully or
2 unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-
3 077 (1994).

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5 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

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8 4.5 We are aware of the difficulties inherent in proving, or disproving, that an incident such as
9 the one presented here occurred, especially where no one else witnessed or heard the disputed
10 incident. Both the alleged victim and the alleged harasser bear the burden of proving, with little or
11 no corroboration, that the incident did or did not occur. However, we conclude that Respondent has
12 proven by a preponderance of the credible evidence that Appellant sexually assaulted Ms. Shou on
13 November 16, 1998. Respondent provided sufficient and credible evidence through Ms. Shou's
14 testimony that the incident occurred. Additionally, Appellant's denial is not believable considering
15 that when he first told Mr. Mieldon that he had been in the break room and nothing unusual
16 occurred when Ms. Shou entered but later changed his story to say that he had taken his break in the
17 men's locker room and had been cleaning rooms during the pertinent time frame. Ms. Shou,
18 however, has been consistent in recounting the events of November 16, 1998. Respondent has met
19 its burden of proof and the charges of mistreatment/abuse of a fellow coworker and gross
20 misconduct are sustained.

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22 4.6 Under the facts and circumstances of this case, including the seriousness of the offenses, we
23 conclude that Respondent has proven that the sanction of dismissal is appropriate and the appeal
24 should be denied.

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26 **V. ORDER**

1 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Pablo Del Mundo is denied.

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3 DATED this _____ day of _____, 1999.

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5 WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Nathan S. Ford Jr., Member

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